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In the Supreme Court of the United States

OCTOBER TERM, 1980

KAREN G. SILKWOOD, BY THE ADMINISTRATOR OF HER ESTATE, BILL M. SILKWOOD, ET AL., PETITIONERS

v.

THE KERR-MCGEE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the dismissal of petitioners' claims under 42 U.S.C. 1985(3) on the ground that the alleged conspiracy was essentially a tortious action arising out of a private feud and not one motivated by racial, or any other invidiously discriminatory, class-based animus.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 2

Statement 2

Argument 6

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Arnold v. *Tiffany*, 487 F. 2d 216, cert. denied, 415 U.S. 984 7

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 ..... 3, 5, 6

Bova v. *Pipefitters Local 60*, 554 F. 2d 226 11

Griffin v. *Breckenridge*, 403 U.S. 88 ..... 4, 5, 6, 7, 9, 11

Hughes v. *Ranger Fuel Corp.*, 467 F. 2d 6 9

Kimble v. *D.J. McDuffy, Inc.*, 648 F. 2d 340 ..... 9, 11

Marlowe v. *Fisher Body*, 489 F. 2d 1057 4

McLellan v. *Mississippi Power & Light Co.*, 545 F. 2d 919 11

Novotny v. *Great American Federal Savings & Loan Ass'n*, 584 F. 2d 1235, rev'd on other grounds, 442 U.S. 366 4

Page

Cases—(Continued):

Scott v. *Moore*, 640 F. 2d 708, petition for rehearing filed Apr. 9, 1981 ..... 10, 11

Silkwood v. *Kerr-McGee Corp.*, 485 F. Supp. 566, appeal docketed, No. 79-1894 (10th Cir. Aug. 20, 1979) 3

Taylor v. *Brighton Corp.*, 616 F. 2d 256 8

Statutes and rule:

42 U.S.C. 1985 7

42 U.S.C. 1985(2) 9, 11

42 U.S.C. 1985(3) ..... *passim*

Fed. R. Civ. P. 54(b) 5

Miscellaneous:

Cong. Globe, 42d Cong., 1st Sess. 567 (1871) 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 637 F. 2d 743. The opinion of the district court (Pet. App. 1d-29d) is reported at 460 F. Supp. 399.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1980, and a petition for rehearing initially was denied on January 16, 1981 (Pet. App. 1b-2b). On petitioners' motion, the court of appeals recalled its mandate, withdrew its order denying rehearing, and reentered its mandate and order denying rehearing on April 6, 1981 (Pet. App. 1c-2c). On April 15, 1981, Justice White extended the time within which to file a petition for a writ of certiorari to June 15, 1981, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

42 U.S.C. 1985(3) provides in relevant part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT

1. In November 1976, petitioners, the administrator of the estate and the heirs and survivors of Karen G. Silkwood, filed this action against the Kerr-McGee Corporation, several of its officers, directors and employees, a journalist, and two named and one unnamed agents of the Federal Bureau of Investigation (Pet. App. 1e-32e). As a first cause of action, petitioners charged the private defendants with engaging in a conspiracy—allegedly manifested by, *inter alia*, physical and electronic surveillance, trespass and harassment—to deprive Silkwood "and other persons employed at Kerr-McGee Corporation's Cimarron, Oklahoma nuclear power facility who were endeavoring to organize a lawful labor union to improve their working standards" of the equal protection and enjoyment of the rights "to freedom of speech, freedom of association, freedom of the press, freedom of movement and travel, freedom of assembly, their right to petition their government for the

r 'ress of their grievances, their right to be secure in their persons, homes and effects and their right not to be deprived of their lives or liberty other than by the due process of law" (*id.* at 15e-16e).

Petitioners' second cause of action was virtually identical to the first, except that it defined the target of the alleged conspiracy as Silkwood "and other persons employed at Kerr-McGee Corporation's Cimarron facility who had filed complaints against the Corporation under the Atomic Energy Act" (Pet. App. 21e). Both causes of action were predicated on 42 U.S.C. 1985(3).

Petitioners alleged that the FBI agents joined in an attempt to cover up the private parties' prior conspiratorial actions in November 1974, following Silkwood's death (Pet. App. 4a, 27d, 16e, 20e, 22e, 26e). On that ground, the FBI agents were named in the Section 1985(3) counts. Both courts below also construed these same allegations as seeking damages against the agents under a *Bivens* "constitutional tort" theory (*Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)).[1]

2. The district court dismissed petitioners' Section 1985(3) claims for failure to state a claim upon which relief could be granted and awarded the federal defendants summary judgment on the *Bivens* claim (Pet. App. 1d-29d).

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[1]In a third cause of action, premised on state law, petitioners sought damages from the Kerr-McGee Corporation for injuries and property loss incurred by Silkwood as a result of her exposure to radiation (Pet. App. 3e, 27e-28e). After the claims that are the subject of this petition were dismissed for failure to state a claim upon which relief could be granted, the state law claim proceeded to jury trial and resulted in an award of $505,000 in compensatory damages and $10,000,000 in punitive damages. *Silkwood* v. *Kerr-McGee Corp.*, 485 F. Supp. 566, 570 (W.D. Okla. 1979), appeal docketed, No. 79-1894 (10th Cir. Aug. 20, 1979).

The court began its analysis of petitioners' Section 1985(3) claims (Pet. App. 6d-7d) with this Court's admonition in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), that Congress intended to confine the scope of that section to the prevention of constitutional violations motivated by class-based discriminatory animus (*id.* at 102; footnote omitted; emphasis in original):

> The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. * * * The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.

While it recognized (Pet. App. 11d) that several courts of appeals have applied Section 1985(3) to groups defined by characteristics other than race—such as gender (*Novotny* v. *Great American Federal Savings & Loan Ass'n*, 584 F. 2d 1235, 1243-1244 (3d Cir. 1978) (en banc), rev'd on other grounds, 442 U.S. 366 (1979)) and religion (*Marlowe* v. *Fisher Body*, 489 F. 2d 1057 (6th Cir. 1973))—the district court observed (Pet. App. 15d) that in the present case "both classes alleged are narrowly defined and tied to the particular circumstances of the claimed conspiracy." Because the classes against which the conspiracy was alleged to have been directed "did not * * * exist prior to the occurrence of the events set forth in the complaint and * * * [were] defined by one particular activity or by [Silkwood's] individual situation," the district court concluded that no class-based animus, as the term was used in *Griffin*, could be said to have motivated the alleged conspiracy (*id.* at 16d).

The district court granted the FBI agents' motion for summary judgment on petitioners' *Bivens* claim on the ground that the agents, who did not become involved in the case until after Silkwood's death, "could not have violated the constitutional rights of Karen Silkwood during her lifetime" (Pet. App. 27d).

3. The district court authorized an appeal under Fed. R. Civ. P. 54(b), and the court of appeals affirmed (Pet. App. 1a-12a). Concurring in the district court's interpretation of Section 1985(3), the court of appeals noted (Pet. App. 9a) that "[r]ead literally the statute has nearly unlimited application to private conspiracies designed to deprive persons of the equal protection of the law." Recognizing, however, that this "Court limited the Act's application by requiring as an element of the cause of action 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action' " (*ibid.*, quoting *Griffin* v. *Breckenridge, supra*, 403 U.S. at 102), the court of appeals expressed doubt whether conspiracies against unions or groups with particular views on nuclear safety could satisfy that requirement (Pet. App. 9a-10a). Like the district court, however, the court of appeals found it unnecessary to reach the question whether the deprivation of a person's rights because of his or her membership in either of those groups would satisfy the class-based discriminatory animus requirement, because it found that petitioners' complaint, read as a whole, did not allege a conspiracy motivated by general animus against such groups. As the court of appeals explained (*id.* at 11a):

> To state a cause of action under section 1985(3) the law requires prejudice against a class *qua* class. Here it seems clear from the complaint as a whole that the feud, if there is one, is private; no general prejudice which transcends the immediate dispute is shown.

The court of appeals agreed with the district court that including within the reach of Section 1985(3) "classes" defined essentially by individuals' conduct or activities in a particular circumstance "would make § 1985(3) 'applicable to all conspiratorial interferences with the rights of others, as there are no bounds upon the ingenuity of counsel in pleading novel and diverse classes to fit every conceivable situation' " (Pet. App. 11a, quoting *id.* at 16d).

The court of appeals also affirmed the summary judgment in favor of the FBI agents on petitioners' *Bivens* claim. Reiterating that the federal defendants were not alleged to have been involved in the matter until after Silkwood's death, the court "agree[d] * * * that the civil rights of a person cannot be violated once that person has died" (Pet. App. 11a-12a) and further held (*id.* at 12a; emphasis in original) that "the FBI defendants could not be held liable for the *prior* violations of Silkwood's constitutional rights even if a *Bivens* claim encompasses a relation back theory of conspiracy law."[2]

ARGUMENT

1. Further review of the decision below is unwarranted because it turns on the narrow—and plainly correct—conclusion that an action based on 42 U.S.C. 1985(3) must allege a conspiracy motivated by animus against a person because he or she is a member of a class identifiable apart from the incidents on which the lawsuit is based, and not because he or she has joined with others in the particular activities that give rise to a lawsuit.

When this Court construed Section 1985(3) to reach purely private conspiracies in *Griffin* v. *Breckenridge*, *supra*, it cautioned (403 U.S. at 102) that actions under that

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[2]Petitioners have not challenged the court of appeals' holding on the *Bivens* claim in this Court.

statute must allege at least a class-based, "invidiously discriminatory motivation" behind the conspirators' actions in order to avoid "[t]he constitutional shoals that [otherwise] would lie in the path" of applying the statute to private conspiracies. The Court remarked that, if this limitation were not imposed, Section 1985(3) would be transformed against Congress' intent (and possibly beyond its constitutional authority) into an open-ended right of action, applicable "to all tortious, conspiratorial interferences with the rights of others" (403 U.S. at 101).

It was precisely on this directive that the rulings below were based. Petitioners conceded that their class allegations were "narrowly defined and tied to the particular circumstances of the claimed conspiracy" (Pet. App. 15d). Respondents were not alleged to have conspired against Silkwood because of her membership in the general class of "union organizers" or complainants to the Atomic Energy Commission, but rather because of her particular actions in a private feud with the Kerr-McGee Corporation. The alleged "classes" were thus mere constructs of persons asserted to have responded as Silkwood did to the allegedly unsafe working conditions at the Kerr-McGee facility. As both courts below recognized (Pet. App. 11a, 16d), were petitioners' theory adopted, "classes" encompassed by Section 1985 could be fashioned "to fit every conceivable situation," limited only by "the ingenuity of counsel."

In so holding, the Tenth Circuit joined an unbroken line of appellate decisions rejecting classes defined in terms of the common actions of their members as insufficient for purposes of Section 1985(3). For example, in *Arnold* v. *Tiffany*, 487 F. 2d 216 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974), a group of independent news dealers and distributors brought suit under Section 1985(3), alleging a conspiracy by representatives of the *Los Angeles Times* and another independent news dealer to prevent them from

forming a trade association in violation of the rights and privileges guaranteed them by the First and Fourteenth Amendments. The Ninth Circuit remarked (487 F. 2d at 218 (footnote omitted)):

> The flaw appears in the [plaintiffs'] syllogism when the "animus" alleged herein is compared to that in *Griffin*. * * * [H]ere, the appellants were not injured because they were newspaper dealers, the class alleged, but because of their activities in attempting to maintain a dealer association. The animus is directed at and derived from the dealer association and is divorced from the fact that there is a class of newspaper dealers.

Similarly, in *Taylor* v. *Brighton Corp.*, 616 F. 2d 256 (1980), the Sixth Circuit rejected a Section 1985(3) claim by employees of the defendant corporation alleging a conspiracy to discharge them for reporting safety violations to the Occupational Safety and Health Administration and for belonging to a union. After carefully parsing the complaint, the court characterized the plaintiffs' alleged "class" as having been "defined solely by the conduct of its members" (616 F. 2d at 265). In such circumstances, the court held (*id.* at 266; emphasis in original),

> [the] complaint, however, does not allege that the [defendants] conspired to deny [the plaintiffs] *equality* under the law. Rather, the essence of their claim is that the alleged conspiracy was designed to deny *all* Brighton employees their constitutional and statutory rights to complain about the corporation's safety violations, racial discrimination, and labor practices without becoming victims of retaliation. While the discriminatory retaliation that furthered the alleged conspiracy was directed only at those employees who in fact exercised their rights, the purpose of the alleged conspiracy was to deny the rights of all. Thus, there was no conspiracy to deny *equal* protection or *equal* privileges and

> immunities. Appellants' purported class is nothing more than the group of Brighton employees whose complaints singled them out for discriminatory treatment. It is a group defined by conduct, but it is not a class cognizable under § 1985(3).

Accord, *Hughes* v. *Ranger Fuel Corp.*, 467 F. 2d 6 (4th Cir. 1972) (assuming *arguendo* that Section 1985(3) is not restricted to conspiracies motivated by racial bias, persons allegedly assaulted for attempting to document and report violations of the 1899 Refuse Act are not a class cognizable under the statute because "[t]he action of the defendants was directed at the plaintiffs as individuals because * * * [of] their activities on that particular occasion, not because of any animus against them as members of some class or race" (467 F. 2d at 10; footnote omitted)); cf. *Kimble* v. *D.J. McDuffy, Inc.*, 648 F. 2d 340, 347 (5th Cir. 1981) (en banc) (rejecting, as lacking the racial or other class-based animus required by 42 U.S.C. 1985(2), class of workmen's compensation claimants formed "merely by virtue of their common complaint").

Petitioners ignore these precedents and argue instead (Pet. 10-14) that this Court recognized the viability under Section 1985(3) of classes defined by their members' actions in *Griffin* v. *Breckenridge, supra.* In *Griffin*, petitioners contend, the plaintiffs were found to be the victims of an actionable conspiracy because they were thought to be civil rights "workers" and "activists." But petitioners misconstrue *Griffin*, in which the Court expressly held (403 U.S. at 103) that the conspiracy was motivated by racial discrimination and that defendants' "animus [was] to deprive the [plaintiffs] of the equal enjoyment of legal rights because of their race."[3]

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[3]Petitioners also contend (Pet. 16-20) that the Court should grant the petition in order to exercise its supervisory powers over the Tenth Circuit and discipline that court for resolving "a pivotal material fact

2. Contrary to petitioners' contention (Pet. 14-16), there is no "direct conflict" between the decision below and *Scott* v. *Moore*, 640 F. 2d 708 (5th Cir. 1981), petition for rehearing filed Apr. 9, 1981). In *Scott*, a panel of the Fifth Circuit held that nonunion workers, alleged to have been brutally beaten as a result of a conspiracy among members of local unions in a "union town," constituted a class cognizable under Section 1985(3). The *Scott* court, however, expressly limited its decision to the facts of that particular case, emphasizing (640 F. 2d at 723-724) that "[o]ur decision does not imply that every union-nonunion controversy can create a section 1985(3) cause of action. * * * Unionism or nonunionism in and of itself does not create a covered class." Indeed, the court stated that "[n]ot every conceivable class of persons is covered by the statute. Members of the plaintiff class must share some common characteristic beyond simply being victims of the defendant's conspiratorial conduct" (*id.* at 720).

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question" (*id.* at 16). Specifically, petitioners accuse the court of appeals of improperly "finding" that the alleged conspiracy was directed *only* against Silkwood and not against other members of the "classes" alleged. But petitioners themselves conceded that the "classes" they alleged were "tied to the particular circumstances of the claimed conspiracy" (Pet. App. 15d), and the court of appeals referred expressly (*id.* at 11a; emphasis added) to "the hatred which defendants allegedly harbor * * * against Karen Silkwood *and her associates* arising out of the activities of parties involved." The court of appeals thus assumed *arguendo* that the alleged discrimination was class-based, but held that it was not based on a class cognizable under Section 1985(3) because, under petitioners' own definition of the alleged "classes," they were identifiable only by reference to their members' activities.

Moreover, the Fifth Circuit characterized the theory of the plaintiffs' case in *Scott* (640 F. 2d at 719; emphasis added) as their having been the victims of a conspiracy motivated by "hostility toward *nonunion workers of any race* and the employers who hire them," and the court agreed (640 F. 2d at 723) that the plaintiffs "were denied the equal protection of law because they did not belong to a labor organization or worked for an employer which did not have a collective bargaining agreement and which hired workers without regard to their union membership." Thus, in contrast to the present case, the defendants in *Scott* were charged with conspiring against persons because they were members of a class identifiable apart from the circumstances of the particular case, not because of actions taken by them in a specific situation.[4]

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[4]The *Scott* court compared the plaintiffs in that case to "persons who are victimized because of their political beliefs and associations" (640 F. 2d at 721, 723). Similarly, the court below suggested that the class requirement of Section 1985(3) might be satisfied by allegations that a conspiracy was motivated against an individual "because he was a Democrat" (Pet. App. 10d, quoting Cong. Globe, 42d Cong., 1st Sess. 567 (1871) (remarks of Sen. Edmunds)).

Although, for the reasons discussed in the text, *Scott* does not conflict with the decision below, it may conflict with a prior decision of the Fifth Circuit, *Bova* v. *Pipefitters Local 60*, 554 F. 2d 226 (1977) (conspiracy claims by a nonunion employee against his employer and the local union failed to meet the "class-based animus" requirement of *Griffin* v. *Breckenridge*, *supra*), and may depart in principle from two en banc decisions of that court. See *Kimble* v. *D.J. McDuffy, Inc.*, *supra* (construing the "animus" requirement of *Griffin* as precluding claims under Section 1985(2) by a "class" of workers who filed personal injury or workmen's compensation claims); *McLellan* v. *Mississippi Power & Light Co.*, 545 F. 2d 919 (5th Cir. 1977) (individuals who filed petitions for bankruptcy under federal law do not constitute a class protected by Section 1985(3)). In particular, in *Kimble*, which was decided after *Scott*, the en banc court enunciated principles for construing Section 1985(2) that seem inconsistent with those applied in *Scott*. See 648 F. 2d at 345-347. As noted above, a petition for rehearing in *Scott* is currently pending.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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